case. Nevertheless, the Court does at times give broader and more principled assessments. One may add, in the Court's own words, that:

> bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States.[67]

This combination of an *erga omnes* effect of its judgments in practice, combined with the growing range of its case law on the loss of housing, leads to an increasingly fine-tuned net of legal obligations and considerations. Not only does this guide states directly. It also offers a very important tool for the empowerment of the dispossessed. For all those displaced persons in the Caucasus or the Balkans, the Court's judgments provide clarity where domestic law does not and justice where national authorities fail to do so. Strasbourg judgments in single cases may thereby serve as fissures in an otherwise solid wall of state unwillingness or discrimination against particular social, religious or ethnic groups. While a judgment from the European Court may be one of the final steps on the long road which an individual applicant has to take, it is often one of the first steps on the way to broader reforms to benefit larger groups of refugees and other displaced persons. The implementation of the Court's guidance needs to take place, after all, in the domestic arena.

67 *Opuz v Turkey* (App no 33401/02) ECHR 9 June 2009 [163].

Chapter 9
Re-thinking Responses to Displacement and Dispossession

Lorna Fox O'Mahony and James A. Sweeney[1]

The essays collected in this book address a diverse range of legal problems, from dispossession by eviction for non-payment of rent or mortgage repayments, to allow economic development, or to forced displacement in times of armed conflict. The laws and policies under scrutiny range from various countries' domestic laws to the European Convention on Human Rights, from the law of the European Union to international law, and span what Kenna describes as: 'the *micro* (the level of individual aspirations, interactions and micro political struggles), the *meso* (including the housing systems, its subsystems and institutional contexts) and the *macro* (broadly the national, regional and international context within which housing systems interact with other systems).'[2] While the terrain covered is undoubtedly wide, the essays highlight several important and common issues which characterise the human costs of displacement and dispossession; the ways in which the idea of home is present or absent in legal responses to displacement and dispossession; the apparent limitations of legal structures which this exposes; and the opportunities that a 'home' perspective presents for re-analysing problems involving displacement and dispossession. In this chapter we explore some of the synergies which emerged through our workshop and subsequent work editing the volume, and set out potential avenues for further research.

A common feature of the essays was our deliberate attempt to try to create room in our analyses for the social agent – the displaced or dispossessed individual – rather than being restricted by the dominant structure of existing law, which often excludes the experiences of these individuals. As such, our starting point broadly adopted the epistemological traditions of social constructionism,[3] in as much as the chapters have deliberately placed the lived experiences of the displaced or dispossessed people at the centre of the discussion, and in doing so, have sought to resist the discursive boundaries of current laws and policies in favour of an

1 lorna.fox@durham.ac.uk/j.a.sweeney@durham.ac.uk.

2 See P. Kenna in this volume.

3 See P.L. Berger and T. Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Anchor Books, New York 1967); for discussion of the use of social constructionism in housing research, see K. Jacobs, J. Kemeny and T. Manzi (eds), *Social Constructionism in Housing Research* (Ashgate, Aldershot 2004).

exploratory approach. In much the same way as constructionism has sought to examine research questions independent of the demands of policy makers,[4] our goal has been to attempt to develop a research agenda that is independent from the restrictions implied by law and legal method. This approach has steered us towards examining questions which are not always deemed 'relevant' to legal proceedings, for example, Bright's focus on the personal stories of tenants and mortgagees in arrears. Thus, in a context which tends to be preoccupied by financial considerations, Bright's home perspective highlights the importance of identity – both the identity of the occupier (as borrower/private sector tenant/local authority tenant) and the identity of the person or agency seeking to dispossess – to the question of whether the occupier's personal story can find a legal voice. Similarly, Kenna highlights the need to move beyond the traditional reach of international human rights law approaches to housing policy and legal regulation, into an approach that fully comprehends the multiple levels of complexity inherent in housing systems (the macro, meso and micro), while Sweeney and Fox O'Mahony's analysis of housing and home for asylum seekers – an area which straddles immigration law and social welfare – highlights the dominance of the idea of control which has come to characterise immigration policy in the UK, to the exclusion of the human experiences of 'doubly displaced' asylum seekers.

Our approach also echoes constructionism in our attempts to 'question the status of given assumptions and interrogate the process of "claims-making"';[5] in law as it responds to and implements policy. Rather than applying positivist analyses to current law, the authors 'focus on broader social processes and...the importance of social, political and economic context';[6] to highlight issues which legal processes do not traditionally bring to the fore. For example, van der Walt's study of the eviction of residential occupiers by the state for the purposes of economic development notes that in 'ordinary' cases of eviction (where the state might be seen as performing a more 'neutral' adjudicating role), the nature of different types of claims to land and 'the hierarchical domination of ownership' means that:

> [e]ven when contextual factors enter the equation, courts' professional tendency to enforce the law of eviction 'normally', 'neutrally' or 'objectively' will more often than not still privilege the protection of stronger rights and result in more or less mechanical eviction of unlawful or weak occupiers who are unable to prove legal occupation rights that are strong enough to trump the owner's right.[7]

4 K. Jacobs, J. Kemeny and T. Manzi, 'Introduction' in K. Jacobs, J. Kemeny and T. Manzi (eds), *Social Constructionism in Housing Research* (Ashgate, Aldershot 2004) 2.

5 K. Jacobs, J. Kemeny and T. Manzi (eds), *Social Constructionism in Housing Research* (Ashgate, Aldershot 2004) 3.

6 Ibid.

7 Van der Walt, in this volume, 62.

Van der Walt goes on to add, however, that when the party seeking an eviction is the state, the contextual issues are liable to be completely lost in the debate about the legitimacy of the state's action, so that the:

> ensuing debate is mostly on the legitimacy or justifiability of the compulsory acquisition and not on the eviction or the effect it has on the former residents. The context and the personal circumstances of the individuals and groups affected often do not even feature in the discussion.[8]

On a similar note, Sweeney and Fox O'Mahony show that in the case law concerning state responsibility for asylum seekers in the UK, the debate has been derailed into the question of who is less responsible between central and local government, with the impact on the doubly displaced asylum seeker excluded from the discussion. Breau's approach to the international law rights to housing and home offers the possibility to move beyond the 'minimal' question of legitimacy when considering the conduct of the state towards vulnerable people to focus on the obligations of the international community, via the 'Responsibility to Protect'.

While the issues considered in the collection are wide-ranging, another important common feature is the vulnerability of the people who are at risk of displacement and dispossession. This vulnerability is manifest at several levels: the people most at risk of displacement and dispossession are likely to be poor and marginalised in the first place; and their vulnerability is only exacerbated by the realisation of the threat of displacement and/or dispossession, and further by the exclusion of their voices from legal processes. From the indigenous people displaced in armed conflicts, to asylum seekers, to the occupier of a South African township, occupiers who are seeking to defend their homes in these cases are too easily constructed as a class of people who are 'them' not 'us'. In his seminal analysis of the (self-imposed) limits of legal method, Thomas Ross[9] illustrated how the rhetoric of poverty – separating the poor as 'other' – is combined with the premise that we are helpless to change the 'harsh realities' of society, to place the 'problem' of poverty beyond judicial power or jurisdiction.[10] Similarly, in all of the cases considered in this collection the occupier is either vulnerable because they have no property, or because they are not in a position to defend their claim to property.

With low income obviously linked to arrears, in a benign economic climate at least, in cases of repossession (see Bright, Dyal-Chand) the vulnerability of dispossessed occupiers is likely to stem from poverty, although as Dyal-Chand reminds us, this cannot be disaggregated from other vulnerabilities, such as those resulting from racially motivated behaviour on the part of lenders. Dyal-Chand

8 Van der Walt, in this volume, 62.

9 T. Ross, 'The Rhetoric of Poverty: Their Immorality, Our Helplessness' (1991) 79 *Georgetown Law Journal* 1499.

10 Ibid., 1502, 1509.

and Bright highlight the importance of identity in legal responses to dispossession in two different jurisdictions. Bright's essay demonstrates the contrast between possession proceedings against local authority tenants, where the personal home story can be heard, and cases involving private landlords where:

> If there is a personal home story to be heard, it probably will not be. And if a buy-to-let tenant is a good tenant but it is the landlord who is in default, there is nothing to be done. The occupier has no voice, and will be lucky to receive much notice of having to move.[11]

Not only is the personal story of the occupier not likely to influence the outcome of the case, there is likely to be no opportunity for the court to hear about the likely impact of the dispossession on the occupier. So far as mortgage borrowers are concerned, much depends on the forbearance of the individual lender, with recent initiatives focusing on the development of good practice amongst lenders,[12] rather than focusing (directly at least) on the consequences of losing their home for dispossessed borrowers. Indeed, the lack of empathy on the part of the government for the human experience of repossession – and the adverse consequences that follow loss of home in these circumstances – was highlighted in the comments of then UK housing minister John Healy when he claimed that: 'For some people it can be the only, and it can in fact be the best, option for them to allow their home to be repossessed. Sometimes it is impossible for people to maintain the mortgage commitments they've got. It may be the best thing in those circumstances.'[13]

Both Dyal-Chand and Bright challenge us to think about how the legal process might take greater account of the human impacts of dispossession, and take the first steps in mapping who is privileged under the prevailing system, and who is excluded. Bright reminds us that – with UK responses to the credit crunch largely taking the form of optional 'good practice' protocols:

> The more vulnerable borrowers – those with poor credit histories, illnesses and unreliable income levels – are much more likely to fall into arrears and to have borrowed from the sub-prime lenders who, as we have seen, pursue more aggressive arrears and repossession policies and are not participants in several of these more progressive government initiatives.[14]

11 Bright, in this volume, 36.

12 See for example, L. Whitehouse, 'The Mortgage Arrears Pre-Action Protocol: An Opportunity Lost?' (2009) 72 *Mod. L. Rev.* 793.

13 Comments were made on a BBC Radio Five Live interview, and reported in the *Daily Express* newspaper, 15 February 2010; http://www.express.co.uk/posts/view/157650/Housing-minister-It-s-ok-to-lose-your-home (accessed 20 September 2010).

14 Bright, in this volume, 28.

Dyal-Chand, on the other hand, explains the US response to the recent housing market crisis as revealing – in a departure from its traditional focus on owners – a new focus on renters, which recognises the adverse impact of foreclosure on tenants, and which begins to allow scope for the idea of home as shelter to emergence onto the agenda alongside the dominant image of home (ownership) as an activity characterised by risk taking and individual opportunity.

If the (effectively) automatic prioritisation of the claims of creditors over the interests of occupiers in mortgage possession actions reflects the way in which the 'needs of property owners, self-interested and rational individuals in the market place, override the needs of those who are different: weaker or poorer, or in a different way defined as Other';[15] there is also evidence to suggest that it is those who are most vulnerable who are most likely to suffer adverse effects from dispossession: when a person's economic and social resources are limited, home and the neighbourhood environment play a critical role in that person's life chances and identity.[16] Ironically, those who have the most to lose – who are most vulnerable to the impacts of dispossession – are the most at risk of being dispossessed. As van der Walt observes: 'the destruction [of home] always targets those who are too weak or marginal to avoid it or to defend themselves and their interests.'[17]

A similar picture emerges in relation to displacement: Kenna describes displaced persons as migrants who are 'forced to abandon homes for reasons of fear or survival', including:

> minorities, such as ethnic groups being displaced from their home, women fleeing domestic violence, illegal evictions, people with disabilities being forcibly displaced to institutions, and perpetual displacement through segregated housing, or indeed, lack of access to housing…[18]

Richer, more educated or particularly skilled people *may* be able to avoid forced migration and flee before being expelled – although one might argue that this is akin to 'coerced' migration rather than truly voluntary or economic migration.[19] Likewise recent efforts to render processes for claiming asylum more strict have

15 K. Green, 'Being Here – What a Woman Can Say About Land Law', in A. Bottomley (ed.), *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish, London 1996) 93–4.

16 S. Saegert, 'The Role of Housing in the Experience of Dwelling' in I. Altman and C.M. Werner (eds), *Home Environments* (Plenum Press, New York 1985) 289–90; see also A. Schorr, *Slums and Social Insecurity* (US Government Printing Office, Washington DC 1964).

17 Van der Walt, in this volume, 85.

18 Kenna, in this volume, 137.

19 Cf. the discussion of 'voluntary', 'coerced' and 'forced' returns of failed asylum seekers in Fox O'Mahony and Sweeney, in this volume.

the effect of favouring applicants with greater cultural capital over those who are more vulnerable. Viewed this way, stricter policies do not reduce the number of applications for asylum, but alter the qualities of the successful applicant.[20] This is potentially rather subversive since it would seem to shift the focus of the process away from the needs of the applicant on to the needs of the receiving state, for people who will be less reliant on the welfare state, or for certain categories of worker, for example, that are far more suitable for consideration under mechanisms for economic migration.

Forced migration – in circumstances which often involve violence and trauma – has major impacts on home and identity, with displacement and dispossession having 'profound and long-term implications'[21] on those who are separated from their homes and homelands, and this can only be exacerbated where the displaced people are already vulnerable. Buyse provides valuable examples of cases where displacement resulted from the deliberate and violent destruction of homes (houses burnt down by security forces) or where displaced people were denied access to their homes because they were located in a region of conflict, while Breau argues for a duty to protect based on collective responsibility for all peoples 'especially the most vulnerable'.[22]

The vulnerability of the dispossessed claimant is only heightened when the party on the other side of the dispute is relatively strong or aggressive. In the case of repossessions, this can be the 'strong' property claim of ownership,[23] which easily trumps the relatively weaker claim to use as a home as a result of the 'hierarchical domination of ownership',[24] particularly when it is advanced by creditors – in light of the tendency of the court to prioritise the needs of creditors above other considerations.[25] In the case of expropriation for economic development (van der Walt), the opposing party is the state itself, and this is also the case in relation to the exclusion of asylum seekers from housing and welfare benefits (Sweeney

20 See N. El-Enany, 'Who is the New European Refugee' (2008) 33(3) *European Law Review* 313, arguing at 335 that restrictive EU policies have filtered out: 'certain refugees from the category of the European refugee. Not only must a European refugee fulfil the requirements set out in the [EU] Qualifications Directive, but she must also possess certain other, implicit characteristics: financial resources, economic mobility, an element of power and a willingness to take risks. Though a number of the persecuted possess these traits, the most vulnerable do not.'

21 A. Blunt and R. Dowling, *Home* (Routledge, London 2006), quoting C.J. Wickham, *Constructing Heimat in Post-War Germany: Longing and Belonging* (The Edwin Mellen Press, Lewiston NY 1999) 196.

22 Breau, in this volume, pp. 190, *et seq*.

23 For an extensive analysis of the contest between 'strong' property rights and the protection of marginalised and weak land users see A.J. van der Walt, *Property in the Margins* (Hart Publishing, Oxford 2009).

24 See van der Walt, in this volume, p. 56.

25 See L. Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, Oxford 2006), ch. 2.

and Fox O'Mahony). While these cases demonstrate the relative strength of the dispossessors' legal rights, in the displacement cases discussed in Kenna, Buyse and Breau the 'displacer' may also (or instead) show strength through aggression, for example, in Buyse's discussion of security forces burning homes to the ground, or in other cases of displacement resulting from armed conflict.

Furthermore, in each case, the displaced or dispossessed person's vulnerability is compounded when they lose their home. The 'homeless' person faces both the practical dilemmas of losing their shelter and the psychological impact of losing their home, which has been shown to trigger extreme responses, including alienation and grief amongst the dispossessed occupiers.[26] Brown and Perkins' study of reactions to displacement found that 'the loss of normal attachments creates a stressful period of disruption followed by a post-disruption phase of coping with lost attachments and creating new ones.'[27] Fried[28] and Porteous[29] have both examined the impact of displacement on occupiers, in both cases where several homes in a neighbourhood had been destroyed for urban planning or development reasons (termed 'domicide'). Fried described displacement from home as 'a crisis with potential danger to mental health'[30] and as triggering:

> feelings of painful loss, the continued longing, the general depressive tone, frequent symptoms of psychological or social or somatic distress, the active work required in adapting to the altered situation, the sense of helplessness, the occasional expressions of both direct and displaced anger, and tendencies to idealise the lost place.[31]

Although the ways in which the loss of home is experienced in any given case will vary, the generally negative effects of displacement have been described as 'a widespread and serious social phenomenon'.[32] Although the most extreme reactions occur in only a minority of cases, '[f]or the greatest number, dislocation…does lead to intense personal suffering despite moderately successful adaptation to the total

26 See R.J. Lawrence, 'Deciphering Home: An Integrative Historical Perspective' in D. Benjamin (ed.), *The Home: Words, Interpretations, Meanings and Environments* (Ashgate, Aldershot 1995) 61–2; M. Fried, 'Grieving for a Lost Home' in J. Duhl (ed.), *The Urban Condition – People and Policy in the Metropolis* (Basic Books, New York 1963).

27 B.B. Brown and D.D. Perkins, 'Disruptions in Place Attachment' in I. Altman and S.M. Low, *Place Attachment* (Plenum Press, New York 1992) 279.

28 M. Fried, 'Grieving for a Lost Home' in J. Duhl (ed.), *The Urban Condition – People and Policy in the Metropolis* (Basic Books, New York 1963).

29 J.D. Porteous, 'Domicide: The Destruction of Home' in D. Benjamin (ed.), *The Home: Words, Interpretations, Meanings and Environments* (Ashgate, Aldershot 1995).

30 M. Fried, 'Grieving for a Lost Home' in J. Duhl (ed.), *The Urban Condition – People and Policy in the Metropolis* (Basic Books, New York 1963) 152.

31 Ibid.

32 Ibid., 167.

situation of relocation.'[33] Similarly, Porteous claimed that 'domicide has negative social and psychological effects on its human victims';[34] with the significant factor for the occupiers being the *forced* relocation from their homes. This study indicated that '[c]hange almost invariably involves loss, and bereavement-like symptoms of grief are common among those uprooted and relocated.'[35]

In addition, exiles who lose both home and homeland, particularly in violent circumstances such as armed conflict, are likely to experience what we have termed 'double displacement': dispossessed from their homes and displaced from their homeland. The state of exile has been described as:

> a painful or punitive banishment from one's homeland. Though it can be voluntary or involuntary, internal or external, exile generally implies a fact of trauma, an imminent danger, usually political, that makes the home no longer safely habitable.[36]

The impact of double displacement is captured in the following description of Croation refugees:

> It is not only their concepts of homeland that have been transformed, but also their homes in the most basic, physical sense. From sites of personal control, they were transformed into sites of danger and destruction...People were forced to leave their homes in response to threat, fears, military orders and violent attacks. Many homes literally ceased to exist.[37]

Kinnvall has described forced migrants as experiencing 'a sense of powerlessness and dependence...frequently mixed with an acute anxiety about their new circumstances and strong feelings of homelessness.'[38]

The importance of home for ontological security only exacerbates the existential anxiety experienced by dispossessed people. This in turn is heightened as the status of being without a home – with all the adverse impacts this has on

33 Ibid.

34 J.D. Porteous, 'Domicide: The Destruction of Home' in D. Benjamin (ed.), *The Home: Words, Interpretations, Meanings and Environments* (Ashgate, Aldershot 1995) 153.

35 Ibid., 159.

36 J.D. Peters, 'Exile, Nomadism, and Diaspora: the Stakes of Mobility in the Western Canon' in H. Naficy (ed.) *Home, Exile, Homeland: Film, Media, and the Politics of Place* (Routledge, New York 1999) 19.

37 M. Povrzanovic Frykman, 'Homeland Lost and Gained: Croatian Diaspora and Refugees in Sweden' in N. Al-Ali and K. Koser (eds), *New Approaches to Migration? Transnational Communities and the Transformation of Home* (Routledge, London 2002) 118; also S. Carter, 'The Geopolitics of Diaspora' (2005) 37 *Area* 54–63.

well-being – significantly undermines the ability of displaced and dispossessed people to defend their claims. If we accept that home and housing are 'gateway rights' (Sweeney and Fox O'Mahony) which provide the base for civil and political participation, then we must also ask how those who are excluded from housing and home are able to argue their case: how are the voices, experiences and understandings of displaced and dispossessed people heard within the legal system, in light of their marginalised position. At the same time, we are acutely aware of the limitations of legal method in framing the types of interests we are seeking to advance. As the discussion above illustrates, it is not difficult to discover why the 'home' interests of vulnerable displaced and dispossessed people are not strongly asserted, particularly when they come up against powerful interests – for example, what are seen as the legitimate claims of creditors or landlords (Bright) or the legitimate exercise of state power (van der Walt, Sweeney and Fox O'Mahony). The 'normal' property framework of rights and entitlements does not protect the weak home interests of those in the margins. In some cases, this has led to 'law' being side-stepped by individual judges, creating a disjuncture between law in theory and law in practice. For example, Bright described how 'a judge who is uncomfortable with evicting a family may try very hard to find some way of avoiding this outcome, perhaps by a scrupulous scrutiny of the paperwork.'[39]

Another obstacle in applying legalistic approaches to the idea of home in displacement and dispossession cases is the problem of minimal compliance. Kenna and Breau both demonstrate the 'soft' nature of international law concerning the right to housing and to the protection of displaced people, while Sweeney and Fox O'Mahony discuss the difficulties of minimal compliance in domestic applications of human rights laws which set minimum standards. The problem, we argue, is that the idea of home in law is not conceptually suited to the absolute standards required of legal frameworks of rights and entitlements. One of the major obstacles to the idea of home in law is the subjective nature of home attachments, which are not subject to legal 'proof'. While the authenticity of home attachments has been well established,[40] home scholarship has recognised that the occupier's interest in property *as a home* is:

> a relative concept, not an absolute one that can be defined in a dictionary or by a linguist. Given that it transcends quantitative, measureable dimensions and includes qualitative subjective ones, it is a complex, ambiguous concept that generates confusion.[41]

39 Bright, in this volume, p. 15.

40 See for example discussion in L. Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, Oxford 2006) especially ch. 4.

41 R.J. Lawrence, 'Deciphering Home: An Integrative Historical Perspective' in D. Benjamin (ed.), *The Home: Words, Interpretations, Meanings and Environments* (Ashgate

Similarly, Dovey has described the difficulties associated with the concept of home, since:

> *home* is not an empirical variable whose meaning we might define in advance of careful measurement and explanation. As a consequence, understanding in this area is plagued by a lack of verifiability that many will find frustrating.[42]

This challenge is compounded by the fact that the legal tools that might be identified as most relevant to the project of developing the idea of home for displaced and dispossessed people also set in place relative rather than absolute standards. Kenna explains in his essay that the right to housing in international law necessarily – as a social and economic right – sets a relative standard which, while ensuring minimum core obligations are set, pitches those obligations at the lowest common denominator. While states which are signatories to the International Covenant on Economic, Social and Cultural Rights, for example, have committed to the principle of progressive realisation of the right to housing set out in that document, it is not possible to legislate for progressive realisation, which depends on the willingness of states to engage with good practice.

Thus, Kenna argues for the need for a 'whole system' approach, which transposes international housing rights into meaningful legal and non-legal standards. We would argue that legal scholarship must play an important role in this process. For one thing, the absence of home arguments in many of the legal contexts examined in the collection demonstrates a need to begin by articulating the home claim more coherently. In order for a 'problem' to be identified as requiring policy attention – to be accepted and acted upon within the policy realm – a number of factors need to be in place. Firstly, the problem must be defined, as 'the policy approach is a problem-focused inquiry'[43] in which social problems are 'formed and framed'. Atkinson has argued that:

> the particular aspects of reality which come to be defined as a 'problem' are rarely self-evidently problems as such. For an aspect of the real to be defined as a 'problem' it needs first of all to be constructed and articulated as an object amenable to diagnosis and treatment in and through a narrative discourse which carries with it an 'authority', or in Bourdieu's terms is enunciated by an individual or organization possessing the relevant symbolic capital to make performative utterances, i.e. to develop a narrative which will be 'listened to' and heeded.[44]

42 K. Dovey, 'Home and Homelessness', in I. Altman and C.M. Werner (eds), *Home Environments* (Plenum Press, New York 1985) 34.

43 W. Parsons, *Public Policy: An Introduction to the Theory and Practice of Policy Analysis* (Edward Elgar, Cheltenham 1995) 85.

44 R. Atkinson, 'Narratives of Policy: the Construction of Urban Problems and Urban Policy in the Official Discourse of British Government 1968–1998' (2000) 20 *Crit. Soc. Policy* 211, 214.

In exploring the issues of displacement and dispossession as they are represented (or not) in legal contexts, the essays in this collection try to draw together a narrative concerning the idea of (loss of) home in law which reveals some of the problems with addressing these interests in legal frameworks. The second step in this process is to influence the policy agenda to recognise a problem as such, so that, in turn, a coalition of support can be formed to ensure that institutional measures are implemented to 'solve' the problem.[45] Jacobs et al. have also emphasised:

> the role of power in bringing housing problems into prominence, the lobbying exercised to first establish housing problems on political agendas, and then influence the policy-making process and finally the decisions to devise specific policies, including justifying the allocation of resources to legitimise interventions.[46]

We argue that legal scholarship plays an important role in defining the problem of displacement and dispossession, by scrutinising the law to reveal the presence or absence of home values in legislative policies and judicial decisions, by identifying potential avenues by which the claim to home can be articulated within and without legal frameworks, and by lobbying for greater attention to be paid to the human interests of displaced and dispossessed people. There is, of course, a strong normative dimension to what we propose. As Breau's essay indicates, whether or not the human consequences of displacement and dispossession are even discussed within the legal arena may depend on what the state thinks it is responsible for. So, while the state (including the state as manifest through the institution of law) may consider itself responsible for matters such as state security (Breau), immigration (Sweeney and Fox O'Mahony), economic development (van der Walt) and even support for the (owner-occupied) housing market (Dyal-Chand) or the property rights of creditors and landlords (Bright), it is much more difficult to 'fix' the state with responsibility for the dignity and worth of the (often marginalised) displaced or dispossessed person.

Having recognised the limitations of employing a rights and entitlements model in this context, we argue that a valuable route forward – which resonates with the theme of progressive realisation – is through seeking to develop good practice, for example, in the extent to which states engage with 'soft law' standards, and to influence policy. A clearer articulation of the problem is crucial in either case. Policy analysts recognise that 'facts are things that never speak for themselves, they require an interpreter'.[47] The power of law in influencing and supporting this

45 See K. Jacobs, J. Kemeny and T. Manzi, 'Power, Discursive Space and Institutional Practices in the Construction of Housing Problems' (2003) 18 *Housing Stud.* 429.

46 Ibid., 430.

47 W. Parsons, *Public Policy: An Introduction to the Theory and Practice of Policy Analysis* (Edward Elgar, Cheltenham 1995) 87.

process was demonstrated in Ross's seminal study of the rhetoric of poverty,[48] in which he highlighted the role of legal methodology and – significantly – the self-imposed limits on our expectations of what law can achieve, in defining the problem of poverty and law's (lack of) responsibility, through the premise that we are helpless to change the 'harsh realities' of society, thus placing the 'problem' of poverty beyond judicial power or jurisdiction.[49]

Yet, this also reveals the important and potentially powerful role of legal scholarship in articulating the problems of displacement and dispossession from home, and in indicating how they might be resolved by law. Blumer argued that 'Social problems lie in and are produced by a process of collective definition';[50] while Jones has added that 'whosoever initially identifies a social problem shapes the initial terms in which it will be debated'.[51] More recently, Atkinson has added that:

> the definition and construction of a 'problem' contains within it the 'solution' to that problem. Moreover, the construction of a 'problem' (and its 'immanent solution') involves the development of a particular discursive narrative (a 'story') depicting/portraying the evolution and causes of the problem.[52]

In 'official' policy making, the dominant discourse determines which stories are told, contains the immanent solutions to the problems which are identified, and:

> By presenting a 'problem' in this manner, a narrative attempts to foreclose debate and prevent a 'problem' from being thought of in ways that are not congruent with the dominant discourse from which the narrative is derived.[53]

We have argued elsewhere[54] for the need for legal scholarship to counter the official discourse which excludes consideration of the experiences of displaced and dispossessed people from law and policy through the development of an

48 T. Ross, 'The Rhetoric of Poverty: Their Immorality, Our Helplessness' (1991) 79 *Georgetown Law Journal* 1499.

49 Ibid., 1502, 1509.

50 H. Blumer, 'Social Problems as Collective Behaviour' (1971) 18 *Social Problems* 298, 301.

51 J.A. Jones, 'Federal Efforts to Solve Contemporary Social Problems' in E.O. Smigel (ed.), *Handbook on the Study of Social Problems* (Rand-McNally, Chicago 1971), 561.

52 R. Atkinson, 'Narratives of Policy: the Construction of Urban Problems and Urban Policy in the Official Discourse of British Government 1968–1998' (2000) 20 *Crit. Soc. Policy* 211.

53 Ibid., 215.

54 L. Fox O'Mahony and J.A. Sweeney, 'The Exclusion of (Failed) Asylum Seekers from Housing and Home: Towards an Oppositional Discourse' (2010) 37 *Journal of Law and Society* 285–314.

'oppositional discourse' shaped through the lens of human experiences. For one thing, as Smith has argued, when proposing greater reference to human (ethical and social) considerations in a similar context: 'while a certain inertia on these points might be expected among politicians and policy-makers, it is increasingly hard to justify in the research community.'[55] In addition, Ross's study of the rhetoric of poverty demonstrates the importance of the way that we (as scholars) talk about issues to the development (or not) of legal strategies to address them.

In their examinations of the various contexts in which displacement and dispossession takes place, and by framing their analyses through a focus on the human experiences of losing home, the contributors to this collection make a valuable contribution to the exposition of the issue, and provide a fresh perspective from which to seek solutions to these problems. In doing so, and in addition to the proposals set out in the individual essays, the suggestions that emerge might usefully inform further research and could form the basis for lobbying for the development of good practice in the ways that lawyers think and talk about displacement and dispossession.

Firstly, we recognise the difficulties with applying a strict legalistic approach (rights and entitlements) in relation to a very 'human' and personal problem (see Bright's discussion of how and why the 'personal home stories' of occupiers in arrears sometimes 'leak' into the decisions of individual judges; also Sweeney and Fox O'Mahony on the ways in which, left to the political will, housing and home for asylum seekers are excluded from 'official' policy but can be re-introduced by individual judges). One of the difficulties, it might be argued, in bringing the human dimensions of home considerations to bear in contests involving dispossession or displacement is the risk that attachments to home might be perceived as 'mere emotion', and so fail to carry weight within the legal arena. The key to addressing this, we argue, is to focus on the *impact* of losing home for the displaced or dispossessed occupier. As one home theorist has suggested in another context: 'the problem lies with the fact that we are dealing with environmental intangibles – attachment, grief, loss – which are immeasurable, difficult to articulate, and thus easy to ignore by the cost-benefit brigade.'[56] By focusing on the damage or detriment to the occupier, on what is lost, it is – theoretically at least – more likely to be possible to capture the harm which will be occasioned to any occupier in any given case. In one sense, the impact of losing one's home can only ever be quantified after the event, since '[b]eing intangible, qualities of home are often

55 S. Smith, 'Banking on Housing: Speculating on the Role and Relevance of Housing Wealth in Britain' (paper prepared for the Joseph Rowntree Foundation Inquiry into Home Ownership 2010 and Beyond, 2005). Smith's comments were made in support of re-evaluating the credit market for home ownership from an ethical and social, rather than merely financial, perspective.

56 J.D. Porteous, 'Domicide: The Destruction of Home' in D. Benjamin (ed.), *The Home: Words, Interpretations, Meanings and Environments* (Ashgate, Aldershot 1995) 153.

only identified when they are lost.'[57] Yet, while empirical studies are certainly capable of capturing the qualitative losses of displacement and dispossession, there are a number of practical obstacles to measuring such losses for the purposes of legal contests, including the resource implications of measuring losses on a case-by-case basis and the prospect that such measurements would effectively become a 'post-mortem' account after the adverse consequences had taken place. Once a person is displaced it becomes very difficult to 'do' anything about it: for this, and other reasons discussed below, we argue that the objective of any protection must be preventative of home loss, with a focus on particularly vulnerable groups.

One approach, which we suggest may be worth pursuing in this context, would be to focus on particular groups of individuals to reflect the idea that different individuals might attribute different types or degrees of value to their homes; or be particularly adversely affected by loss of those homes. So, the idea of home in law might focus on evidence of particular vulnerability which might indicate that the group are at a heightened risk of suffering adverse effects from displacement or dispossession. The group-based approach also resonates with the process of defining social problems for policy making discussed above, with the development of a convincing narrative as the starting point for recognising a housing problem. Atkinson has observed that 'individual narratives do not exist in isolation, but reflect (and simultaneously conceal) a deeper more pervasive narrative linked to particular social (class or group) interests.'[58] One such group interest might be the welfare of children;[59] another could be based on structural factors, for example low income;[60] or a critical gendered perspective which recognises structural inequality and the unequal distribution of responsibilities;[61] or, where people have experienced trauma and violence, for example in armed conflict, it might be appropriate to argue that, as a group, their need for protection against (further) displacement is greater as a result of the vulnerabilities caused by these experiences.[62]

At the same time, we also need to be sensitive to the risk that certain groups of occupiers who are in fact vulnerable can be portrayed as 'villains' due to their 'otherness', and that such regressive arguments can potentially subvert claims that their needs should be recognised as a priority. Ross gives the example of the rhetorical separation of 'the poor' as different, deviant, morally weak, achieved, in

57 K. Dovey, 'Home and Homelessness', in I. Altman and C.M. Werner (eds), *Home Environments* (Plenum Press, New York 1985) 56.

58 R. Atkinson, 'Narratives of Policy: the Construction of Urban Problems and Urban Policy in the Official Discourse of British Government 1968–1998' (2000) 20 *Crit. Soc. Policy* 211, 213.

59 This proposition is advanced in Fox, *Conceptualising Home: Theories, Laws and Policies* (Hart Publishing, Oxford 2006) ch. 9.

60 See above, text to n. 13.

61 See for example, L. Fox, 'Re-possessing "Home": A Re-analysis of Gender, Home Ownership and Debtor Default for Feminist Legal Theory' (2008) *Wm. and Mary J. Women and L.* 423–94.

62 See generally, Breau, in this volume.

part, through the separation and stigmatisation of people in poverty using themes of difference and deviance which enable us to distinguish groups of people as 'them' and 'us', and 'to make *their* suffering intellectually coherent'.[63] The two main categories of occupiers running throughout the papers in this collection might be described as 'the poor', on the one hand (Bright, Dyal-Chand, van der Walt) and 'exiles' – refugees, asylum seekers, internally displaced persons – (Sweeney and Fox O'Mahony, Buyse, Kenna, Breau) on the other. In both cases, there is a risk of 'demonisation'[64] which must be met head on in any attempts to establish a convincing new narrative which focuses on the human needs of displaced and dispossessed people, rather than constructing their very existence as a (social) problem. In doing so, it is also worth remembering that everyone has to 'be' somewhere: we all have to live somewhere, physically, materially and socially; and that displacement and dispossession merely move 'the problem'/the people around.

Another outcome of our symposium was that the idea of home in law, particularly in relation to displacement and dispossession, is complex and often difficult, both in respect of the range of 'legal' and 'extra-legal' strategies that might be adopted to enable home claims to be more coherently represented in the legal arena, and in relation to the interactions between these strategies and the social policy context. We have noted above that in many senses the strict legal concepts of rights and entitlements are not likely to prove fruitful, but suggest that a more valuable strategy is to adopt a 'whole system' approach, taking account of the matrix of housing rights which are recognised and acknowledged in relation to housing and home, from human rights laws at the 'hard' enforceable end of the spectrum to soft law approaches which build norms through the articulation of responsibilities towards people who live at the margins, and through these norms to influence policies. Kenna captures this process when he describes the idea of human rights functioning as a 'moral compass' for the development of law and policy around the globe. An example of this process in practice can be seen in the Participation in the Practice of Rights project in Northern Ireland and the work of the Community Action Network with the Rialto Rights in Action group in Dublin, which demonstrate how the moral norms articulated by rights-bearers can be utilised to put pressure on duty-bearers to deliver, and so to give content to the right to housing and other rights.[65] Similarly, Breau illustrates the role of norms in the emergence of customary principles, which in turn can be influential in the policy-making process.[66]

63 T. Ross, 'The Rhetoric of Poverty: Their Immorality, Our Helplessness' (1991) 79 *Georgetown Law Journal* 1499, 1508, emphasis added.

64 In the case of 'the poor', see ibid; in the case of 'exiles', see L. Fox O'Mahony and J.A. Sweeney, 'The Exclusion of (Failed) Asylum Seekers from Housing and Home: Towards an Oppositional Discourse' (2010) 37 *Journal of Law and Society* 285–314.

65 See http://www.pprproject.org/; www.canaction.ie/

66 See generally, Breau, in this volume.

In practice, the problems associated with displacement and dispossession raise difficult questions, which are hard to answer in a context of limited resources, and sometimes against a backdrop of media and public opinion – even political comment – which appears to demonstrate little sympathy for the displaced or dispossessed occupier – whether through framing asylum seekers as 'cheats', 'illegals', 'spongers' and 'social parasites' on the welfare state, or by casting people who cannot pay their rent or mortgage as 'failures' in the individualised, market-dominated ownership society described by Dyal-Chand. We do not suggest that eradicating displacement and dispossession, whether at a local, national or global level, is simply a matter of lawyers and policy makers choosing to make it so. Yet, on the other hand, the impact of the global recession in bringing home to all of us our vulnerability to dispossession might potentially be viewed as a 'tipping point'[67] for understanding and responding to the human consequences of losing home. In considering the role of the academic in responding to these problems, our modest aim in this collection is to demonstrate, when there are difficult choices to be made, the key importance of articulating the 'home' considerations on the side of the occupier, as well as recognising the competing interest of the 'strong' claimant on the other side. We argue that a clearer and more coherent understanding of the consequences of losing home is needed, and that, rather than allowing dominant to automatically trump less robust claims, particularly when this may lead to the loss of home by vulnerable, voiceless or marginalised people, it should be framed by focusing on how displacement and dispossession impacts on the people who are affected, adopting a 'whole system' approach, with particular attention to the role of human rights norms in transmitting the values of housing and home into the legal domain.

67 See M. Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (Little Brown, 2002).

Index

Figures are indicated by **bold** page numbers, tables by *italic* numbers.